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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 843

petition not printed

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.*,
CARMINE PIZZA,

Petitioner,

against

JOHN F. FOSTER, Warden of Auburn State Prison, Auburn, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

The petitioner prays for a writ of certiorari to review an order of the Court of Appeals of the State of New York dated October 3, 1946 (R. 31) denying leave to appeal to that Court and dismissing an appeal taken as of right from an order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, entered in the office of the Clerk thereof on June 26, 1946 (R. 29), unanimously affirming an order of the Supreme

Court of the State of New York entered in the office of Clerk of Cayuga County on February 7, 1946 (R. 26) dismissing petitioner's writ of habeas corpus and remanding him to the custody of respondent as Warden of Auburn State Prison, Auburn, New York.

Facts

On or about October 5, 1932 petitioner was indicted by the grand jury of Queens County in the State of New York for the crime of murder in the first degree (R. 10). The indictment was handed up to the New York Supreme Court by the foreman of the grand jury at a term of court held in and for the County of Queens, and, on motion of the District Attorney, the case was transferred to the County Court of Queens County for trial (R. 11). Petitioner was tried by a jury and found guilty of the crime of murder in the second degree and on December 2, 1932 was sentenced to State prison for a term of twenty years to life (R. 17).

The Issues

Petitioner has attacked the legality of his confinement on two grounds: (1) that the indictment was not properly presented to the Court in the first instance, and (2) that the indictment was not properly transferred from Supreme Court to County Court for trial; contending that these two alleged errors denied him due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. We argue that as no constitutional question was necessarily decided by the New York courts, this is not a proper case for the allowance of certiorari, aside from the fact that there is no merit to petitioner's contentions of alleged error.

ARGUMENT

The New York Courts did not necessarily decide any constitutional question in dismissing petitioner's writ of habeas corpus.

Petitioner has alleged that when the foreman of the grand jury handed up the indictment to the Court, the other members of the grand jury were not physically present in the courtroom, and he claims that such absence invalidated the indictment (R. 4).

This Court does not have jurisdiction to hear petitioner's application since there is nothing to show that the New York courts necessarily decided against petitioner on any constitutional ground. Throughout all of the hearings below, we have emphatically argued that petitioner offered no proof to the effect that all the grand jurors were not physically present in the courtroom and we contend that, in the absence of proof to the contrary, it must be presumed that all proceedings at the original trial were regular and proper (*People ex rel. Albanese* v. *Hunt*, 266 App. Div. 105, 108 [4th Dept., 1943], aff'd without op., 292 N. Y. 528 [1944]; *People ex rel. Kammerer* v. *Brophy*, 255 App. Div. 821 [4th Dept., 1938], aff'd without op., 280 N. Y. 618 [1939]; *Richardson on Evidence* [6th ed. 1944] §§ 64-5, pp. 35-6).

It is not only very possible, but even probable, that the New York courts decided against petitioner on the basis of this lack of proof alone, without ever considering any constitutional question raised by petitioner. And, as this Court stated in *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206 (1938), at pages 212-13:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively

> from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Lynch* v. *New York*, 293 U. S. 52, 54."

Another jurisdictional objection which we make to petitioner's moving papers is that he raises a question of statutory interpretation which is not subject to review by this Court. Petitioner claims that at the time of his conviction in 1932, Section 272 of the New York Code of Criminal Procedure required that all the grand jurors be physically present in the courtroom when an indictment was presented to the Court by the foreman. He also made this contention in the State courts where his writ of habeas corpus was dismissed. At any rate, this Court should not undertake to construe and interpret a State statute (*Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32-3 [1924]). Although it is collateral to this jurisdictional issue, it should be noted in passing that, at the time of petitioner's conviction in 1932, Section 272 contained no such mandate as is claimed by petitioner. Prior to its amendment in 1927, that section provided that an indictment found by the grand jury "must be presented by their foreman in their presence to the court." By Chapter 249 of the New York Laws of 1927, effective March 23, 1927, Section 272 was amended so as to delete the phrase "in their presence" from the above language.

Even in the absence of the jurisdictional defect, the only possible issue which petitioner could raise here with re-

gard to his first contention would be to argue that regardless of any statute on the subject, if all members of a grand jury are not physically present in the courtroom when an indictment is presented to the Court, the indictment is invalid. Such an objection clearly would be without any merit whatsoever. In *Breese* v. *United States,* 226 U. S. 1, 10-11 (1912), this Court squarely held that an indictment presented in this manner does not violate the Fifth Amendment to the United States Constitution.

Petitioner's contention that his indictment was not properly transferred for trial from Supreme Court to County Court is likewise insufficient to justify the issuance of certiorari, since it is subject to the same jurisdictional defect above expressed. Petitioner offered no proof in support of his claim that no actual transfer order had been made, and we have consistently relied on the presumption that there was such an order. On the contrary, petitioner has conceded that the minutes of the Clerk of the Supreme Court contain the statement that the indictment was transferred to County Court for trial on motion of the District Attorney (R. 6-7 [Petition]; R. 11 [Minutes]). As in the case of petitioner's first contention, there is nothing to show that the New York courts decided any constitutional issues in rejecting this second argument. Again it is quite probable that the sole basis for the Court's decision was the absence of any proof to support petitioner's allegations. Such an assumption is directly in accord with the holding of the Appellate Division of the New York Supreme Court in the case of *People ex rel. Albanese* v. *Hunt,* 266 App. Div. 105, aff'd without op., 292 N. Y. 528 (1944), involving the precise question now raised by petitioner, and

dealing with an almost identical set of facts, where the Court held that the notation of transfer in the Clerk's minutes constituted an unrebutted presumption that the transfer was valid. In any event, there is nothing to indicate that any rights of petitioner were prejudiced in violation of the Constitution.

Further support for our position that the New York Court of Appeals did not consider or decide any constitutional question in this case is accorded by the fact that petitioner's appeal to the Court of Appeals taken as of right was dismissed by that Court although Section 588, subdivision 1(a), of the New York Civil Practice Act provides that an appeal may be taken as of right where "there be directly involved the construction of the constitution of the state or of the United States." Thus, in dismissing petitioner's appeal, the Court of Appeals determined that no substantial constitutional issue was involved.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be dismissed.

Dated: January 20, 1947.

Respectfully submitted,

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